Filed 1/14/19 In re A.T. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.T., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.B., Defendant and Appellant.	E070389 (Super.Ct.No. J270292) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, Svetlana Kauper, Deputy County Counsel for Plaintiff and Respondent.

Defendant and appellant M.B. (mother) is the mother of A.T. (minor). S.T. (father) is minor's presumed father.[1] Mother appeals from the juvenile court's order summarily denying her Welfare and Institutions Code[2] section 388 petition. For the reasons set forth below, we affirm the court's denial of mother's petition.

FACTUAL AND PROCEDURAL HISTORY

I. PROCEEDINGS BEFORE JULY 17, 2017, IN CASE NO. E068773:[3]

A. DETENTION, JURSIDICTION/DISPOSITION

1. *DETENTION*

Minor, a female, was born in September 2016. Mother and father (collectively, parents) lived separately but father visited minor often. Parents were hoping to reconcile. Parents were both in their 20s when minor was born.

On March 29, 2017, plaintiff and respondent San Bernardino County Children and Family Services (CFS) responded to a child welfare referral indicating that minor, then six months old, was the victim of physical abuse and neglect. Minor had a broken left humerus and left ulna; mother's story was inconsistent with minor's injuries. The investigating social worker learned that minor had a severe displaced fracture of the left humerus (long bone in the upper arm), and fractures to her left ulna and radius (two

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[1] Father is not a party to this appeal.

[2] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

[3] This section consists of facts taken from the "Factual and Procedural History" from our unpublished opinion in case No. E068773.

forearm bones). Minor needed surgery for the fractures. Mother claimed that minor was injured when lunging forward attempting to crawl, but minor's treating doctor, Dr. Natasha Lee, opined that mother's explanation did not match the injuries.

Earlier that day, mother dropped minor off at the home of maternal grandmother (MGM) prior to going to work; they had done this since December 2016. Mother claimed she left work early that day, around 2:30 p.m., and picked up minor. When she returned home with minor, it was around 4 p.m. She put minor down on the floor with a blanket and toys. Mother made minor a bottle and began to play with minor on the floor. Minor lunged forward from a sitting position and began to cry, but quickly calmed down. When minor cried again, mother believed minor was teething. Mother took minor to the store and bought Orajel. When they returned, mother placed minor in a walker. Mother noticed that minor was not using her left arm like usual. Mother put minor in the crib and her arm appeared limp. Mother called MGM, who summoned mother to MGM's home. When mother arrived at MGM's home minor was sleeping. When minor woke up, MGM and mother noted that minor's left arm was swollen. They took minor to the hospital. Mother stated that father visited minor about five times weekly, and last visited on March 28, 2017, for an hour at mother's home. MGM recalled that father told her when he visited minor on March 27, 2017, that minor fell off the couch.

After the social worker's inquiry, mother admitted that father had battered her in 2013. Father hit mother on the face and arms, and was arrested after neighbors contacted the police.

The attending physician reviewed minor's X-rays and opined that mother's story about minor lunging forward did not cause minor's fractures. Additionally, minor's injuries could not have been caused by her falling from a couch three days earlier, with her only presenting symptoms that day. Law enforcement was also investigating minor's injuries.

On March 30, 2017, a supervising social worker spoke with father by telephone. Mother told father that she was taking minor to the hospital, but parents did not feel it was anything serious. In a telephone call with CFS on April 3, 2017, father stated that he believed mother's story indicating minor was injured due to lunging forward on the floor. Father visited minor on March 22, 2017, at mother's home, and did not notice anything unusual about minor. He admitted that he smoked marijuana but denied he was addicted to it. He also admitted that he engaged in domestic violence with mother in 2013. A criminal history inquiry indicated that father was charged with domestic violence and receiving stolen property in 2013. Mother had no criminal history.

On March 30, 2017, CFS detained minor at the hospital. On April 3, 2017, CFS learned the forensic pediatrician, Melissa Siccama, from Loma Linda University Children's Hospital, opined that minor's injuries were consistent with non-accidental trauma. The next day, April 4, 2017, CFS initiated a dependency by filing a section 300 petition with allegations stated under subdivisions (a) serious physical harm; (b) failure to protect; and (e) severe physical abuse. Allegations ultimately not sustained were pled under subdivision (b), and indicated that father engaged in domestic violence and abused substances, placing minor at risk. Allegations that were ultimately sustained were pled

under subdivisions (a) and (e) as follows: "On or about March 30, 2017, the child . . . was examined at Loma Linda University Medical Center and was found to have sustained multiple injuries including, but not limited to: a left displaced fractured humerus and left fractured ulna and radius. The explanation provided by the child's parents . . . for the child's injuries is not consistent with the injuries. Dr. . . . Melissa Siccama found the injuries to be consistent with non-accidental trauma. The injuries occurred while the child was in the care of parents."

On April 4, 2017, minor was discharged from the hospital and placed with the maternal grandparents.

On April 5, 2017, at the detention hearing, parents were present in court with their respective appointed attorneys. The court found a prima facie case under section 300 and for detention out of the home, detained minor with the maternal grandparents, ordered at least two-hour supervised weekly visits, and set the jurisdiction/disposition hearing for April 26, 2016.

2. *JURISDICTON / DISPOSITION*

A jurisdiction/disposition report filed April 24, 2017, recommended that the court sustain minor's section 300 petition and apply family reunification bypass (FR bypass) to parents under section 361.5, subdivision (b)(5), relating to severe physical abuse of a child under age five, and maintain minor with the maternal grandparents. The report noted that not only did minor sustain three fractures of her left arm but a CT scan revealed that minor had blood on the left side of her brain caused by an acceleration or deceleration mechanism.

Parents had been in a relationship for about five years. Minor was their only child together. They separated because of father's infidelity, but reconciled after two months; they lived together. Parents maintained that minor's injuries were caused by an accident. Dr. Siccama opined that minor's three arm fractures were consistent with non-accidental trauma, not with parents' stories. In addition to crawling, lunging, and falling on a carpeted floor by minor as explanations for minor's injuries, parents also stated that father visited minor two days prior to minor's hospitalization. At that time, mother stepped out to do laundry. When she returned, minor was crying. Father stated that minor fell off the couch when he was washing dishes. Minor, however, showed no signs of being injured. Father did not see minor the day she was taken to the hospital.

With regard to the 2013 domestic violence charges, mother admitted that she and father argued, and father hit her in the face and arms with a closed fist. She, however, denied that she and father were drinking alcohol. Father did admit that he had a "few beers" and was buzzed, but contended that he hit mother in the face with an open hand. Father was convicted of a domestic violence charge. Although mother had a restraining order against father, she had the order removed after they "talked things out." Father was sentenced to jail time, ordered to pay fines, and placed on probation for a term ending in February 2017. Father was also required to attend a domestic violence course and NA/AA meetings, and to not consume alcohol.

Mother described herself as a casual drinker; she denied that father had a drug or alcohol problem. Mother contended that father used marijuana only once. Father, however, stated that he drank alcohol about twice a month and smoked marijuana to

relieve his stress. He last used marijuana three weeks prior, and estimated that he smoked it twice weekly.

MGM noted that minor was fine when mother picked her up from her home on the date when minor's injuries became evident. In the evening mother called MGM in a panic stating that minor was not moving her arm properly. When mother arrived with minor at MGM's home, mother and MGM noticed minor's arm was swollen; it must have been hurting minor because she was crying when she moved her arm or when the arm was touched. They immediately took minor to the hospital.

The social worker noted the inconsistencies with parents' stories about father's use of alcohol and marijuana, about the domestic violence between parents, and regarding minor's injuries. The social worker reported as follows:

"The inconsistencies in stories are concerning . . . . It is clear that the parents are not being fully forthcoming. With the addition of discovering blood in the child's brain, it further confirms that non-accidental trauma was inflicted upon [minor]. Given the severity of the child's injuries coupled with her young age and no reasonable explanation as to her injuries, it is recommended that the parents be offered NO-FR services pursuant [WIC 361.5b5]."

On April 19, 2017, parents attended a supervised visit with minor, and demonstrated fitting parenting skills during the two-hour visit. Minor also did not appear distressed or afraid of parents.

3. *ONGOING INVESTIGATION/EVIDENCE*

The juvenile court continued the jurisdiction/disposition hearing a few times at the request of parents' counsel (1) to allow doctors to assess whether minor had a bone disorder, which may explain minor's fractures; and (2) to permit bifurcated evidentiary hearings addressing jurisdiction and disposition issues because parents did not agree with CFS recommendations.

An addendum report filed on May 24, 2017, provided the results of a bone fragility studies indicating that minor had no predisposing conditions. Without a history of significant trauma to explain minor's injures, Dr. Siccama opined that "the injuries are diagnostic for child physical abuse."

Parents engaged in services before the court held the jurisdictional and dispositional hearings. Mother attended therapy with Catrina Johnson Green, a licensed professional clinical counselor. Mother also submitted to a psychological evaluation by Dr. John Kinsman.

In a report dated July7, 2017, Green stated that mother enrolled in individual therapy and domestic violence counseling, and attended parenting education training on April 25 and June 15, 2017. Green provided that mother successfully participated in eight individual therapy sessions, nine domestic violence counseling sessions, and four parenting education training sessions. Green opined that mother made "good progress" and set new limits and boundaries in her life. There was no indication that Green obtained discovery for the case. Green, however, stated that mother openly addressed why CFS became involved in mother's life, identified core conflicts, improved her self-

awareness, and gained a new understanding regarding the influence of the past on her present behavior. Mother " 'found her voice' " and realized how she feels was important. Mother "has begun the work of becoming . . . the 'best mom possible.' "

In a report dated July 8, 2017, Dr. John Kinsman indicated that he was retained by mother's counsel to address whether mother could benefit from FR services, and whether services would likely prevent future abuses of minor. Mother's counsel provided Dr. Kinsman records indicating minor's date of birth, and the fact that minor was removed from parents "due to allegations the child may be at risk following the discovery of physical injuries to her that are inconsistent with explanations offered by her parents." Dr. Kinsman noted his professional opinions were based on the information he had at the time of the evaluation.

In the report, Dr. Kinsman indicated that on July 1, 2017, mother completed three testing measures, the Millon Clinical Mutiaxial Inventory-IV (MCMI-4), the Parenting Stress Index-4 (PSI-4), and a Personality Assessment Inventory. To render a psychological assessment of mother, Dr. Kinsman evidently used the results of those tests, along with defendant's self-report of her history, and Dr. Kinsman's observations of mother. Dr. Kinsman did not explain in his report the process he used when implementing the three testing measures. He also did not indicate what the tests were intended to be used for or confirm the tests were generally accepted as reliable in the scientific community, particularly regarding the question of whether FR services to a parent, in legal reunification timeframes for a baby, would likely prevent future abuse of the child.

Dr. Kinsman noted that mother was oriented as to time, person, place and the purpose of their meeting. Dr. Kinsman noted that mother was raised by her parents until her mother died when mother was six years old.[4] In 2009, mother graduated from high school and almost completed a bachelor's degree. Mother worked at a bank. She denied substance abuse and criminal history. She consumed alcohol on rare occasions. She and father had been together for five years. Mother denied a history of treatment for mental or emotional issues until beginning counseling with Green.

In his report, Dr. Kinsman explained that the test data and results from a clinical interview suggested mother responded to inquiries defensively, and tried to portray herself as being free of shortcomings. The doctor saw no indication that mother suffered from psychosis, but she had sadness and distress related to losing custody of minor. She was described as adept at winning over the favor of others, but had few long-lasting relationships, which led to her self-doubt. When mother faced rejection, she may behave erratically. Dr. Kinsman felt that nothing in his evaluation "directly" indicated mother represented a threat to minor's safety, but her insecure preoccupation with her own psychological issues may limit her maternal effectiveness. Mother was experiencing signs and symptoms of "Major Depressive Disorder, Moderate, with Anxious Distress," and "Compulsive Personality Style."

[4] Mother claimed that MGM helped her babysit minor. We assume that MGM is mother's stepmother.

Dr. Kinsman recommended that mother engage in individual therapy and couples therapy with father, and receive a psychiatric evaluation to determine whether medication might relieve mother's depression and anxiety.

The juvenile court held a jurisdictional hearing on July 12, and the dispositional hearing on July 17, 2016.

B. JURISDICTION HEARING

On July 12, 2017, at the contested jurisdictional hearing, the court accepted the reports by CFS into evidence. In argument, counsel for CFS and minor's counsel asked the court to follow CFS recommendations. Mother's counsel noted that mother objected to all jurisdiction allegations; mother claimed that she did not injure minor. Father's counsel objected to the sustaining of the domestic violence allegation, but father acknowledged something terrible happened to minor, and he took responsibility for not being more protective of minor.

The court sustained the section 300, subdivisions (a) and (e) allegations by clear and convincing evidence, but dismissed or found "not true" the other allegations. At the request of mother's counsel, the court authorized release of CFS reports to therapists or persons working with parents.

C. DISPOSITION HEARING

At the contested disposition hearing on July 17, 2017, the court admitted the reports filed by CFS into evidence, received testimony from mother; therapist, Catrina Johnson-Green; Dr. John Kinsman; and social worker, Stephanie Siringoringo. The court permitted argument before rendering a judgment.

1. *TESTIMONY: CATRINA JOHNSON-GREEN*

Therapist Catrina Johnson-Green testified she had a master's degree in counseling and had been a licensed counselor for six years. CFS referred clients to her. She was a certified facilitator of a batterer's and child abuse prevention program. Mother attended eight individual therapy sessions. Mother also attended domestic violence group counseling, monthly, which Green facilitated. Initially, mother was guarded. Mother then demonstrated progress by learning to be more diligent in safely parenting her child, and being more expressive with her own needs. Mother also demonstrated how to be a better mother and more emotionally connected to minor. Whether mother perpetrated abuse did not affect Green's assessment. She stated, "It's not my job to prove guilt or innocence." Mother initially presented as emotionally detached but learned new coping skills. Green recommended more therapy for mother.

The focus of domestic violence group therapy was to identify and hold the client more responsible for their choices and to not blame others. In group therapy, mother appeared emotionally detached. In her parenting program, they focused on alternatives to discipline, and how to build compassion. Mother was reportedly compliant in the parenting program. Green saw no reason to believe mother could not safely parent a child in six months. Mother, however, told Green that minor injured herself by falling off the couch, or something similar.

Green expressed it did not matter to her whether mother caused minor's injuries. Mother had consistently reported that the injuries were caused by an accident; Green was looking at mother's progress. Green focused on preventing mother's neglect of minor, but Green did not know what had happened to minor. Minor's return to mother was not Green's call, but she stated, "I don't see a danger to the child by mom."

If the court found that mother had perpetrated abuse on minor causing three breaks in minor's arm, that did not impact mother's progress in therapy. Green suggested that she did not see a correlation between a client continually lying about abusing a child, and the parent's progress in services. However, on cross-examination, Green stated, "If [mother is] lying, . . . she's still making progress toward changing the behavior. But, it would be hard if she's lying to me that's different." Thereafter, the following exchange took place between CFS counsel and Green:

"Q: In your opinion does accepting responsibility have any correlation to reaching therapeutic goals?

"A: Yes,

"Q: How is that?

"A: Accepting responsibility says that I need to do something different because I made some mistakes. Neglect is part of that.

"Q: And as well as physical abuse?

"A: . . . Yeah."

2. *TESTIMONY: MOTHER*

Mother testified that on Monday, March 27, minor fell off the couch when minor was with father, and mother was doing laundry, according to father. Minor did not have any apparent injury and mother cared for minor that day. Minor had no apparent injury on Tuesday either. Minor injured her arm on Wednesday, March 29, when attempting to crawl. "[Minor] was reaching for something[,] she had toys around her. . . . She kind of went over and launched herself." Mother was in the kitchen and minor was visible. Mother heard a thump and saw minor on her left side. Minor cried really loud but mother waited a few hours before taking minor to the hospital because mother did not notice minor was injured until she placed minor down for a nap; when mother moved minor's arm, minor cried.

In therapy, mother talked about minor being injured by falling on her side. Mother, however, acknowledged that doctors did not believe her story. She admitted she told her therapist minor fell off a couch, but she was not staying that was how minor hurt her arm.

Mother's counsel read the section 300 severe physical abuse allegation the court sustained, and asked mother, "You're not disputing that, correct?" Mother responded, "No." Mother asked the court to order continued services for her; she acknowledged she was responsible for CFS becoming involved in her life. Mother felt she had learned to be a better parent. She completed individual counseling and felt she had benefitted from it. In domestic violence classes, she learned she had to take responsibility for her actions.

Mother loved minor, and knew minor loved her; minor became excited when she saw mother. She was minor's primary caregiver prior to minor's removal. Mother felt she and minor had a bond.

When asked what she would do differently, she said she would pay more attention to minor; mother added, "she was not abused." Mother did not agree minor's three broken bones were caused by physical abuse, despite the court findings and opinions of doctors. Mother denied ever being frustrated with minor or ever shaking minor, but did not dispute that minor was injured while in her custody.

3. *TESTIMONY: DR. JOHN KINSMAN*

The court accepted a stipulation between the parties that Dr. Kinsman was qualified to testify as an expert on psychological evaluations. Dr. Kinsman was a psychologist who practiced for 25 years, and performed approximately 15 to 20 evaluations a month. He evaluated mother in July, using a clinical interview, a mental status examination, and three testing measures. Dr. Kinsman opined that mother would benefit from FR services, which would likely prevent reabuse of minor. His opinion was based on his impressions of mother during his interview of her, and her test results. His "sense" was that mother may have been experiencing depression.

Therapy would be intended to help mother develop better coping mechanisms. Dr. Kinsman opined mother's compulsive personality and anxiety would not prevent her from successful parenting. The MCMI-4 test measured clinical subtypes like depression or anxiety or psychosis. The PAI did something similar; one of mother's strengths was

that she was intelligent. She demonstrated the capacity to learn and to modify her behavior.

Dr. Kinsman repeatedly questioned whether mother physically abused minor. He noted that law enforcement had not pursued charges against her, evidently lacking proof that mother abused minor. Dr. Kinsman also remarked that mother explained minor became injured by rolling over on a toy. It was not his "role" to ask questions concerning whether mother intentionally caused minor's injury, as "law enforcement does that." When counsel for CFS reflected on the evidence mother was alone with minor when minor was injured, and mother gave an implausible explanation for the injuries, Dr. Kinsman replied, "It's interesting that you use the word evidence because if evidence were the issue I think she would probably be wearing orange right now." "[I]f a child badly is injured, and there is evidence . . . there would probably be an investigation. And that doesn't seem to have resulted in any charges."

Dr. Kinsman felt that it did not matter whether mother came "clean" about what happened to minor; that would not mean she could not benefit from services. However, on cross-examination, he admitted that after six months of therapy, he would think mother should be able to provide an adequate understanding of what happened to minor.

Dr. Kinsman admitted he would feel a lot more comfortable if mother admitted that, as a young mother, she was unaware of how fragile babies were, and it would never happen again, "[h]owever I don't know that your hypothetical has any basis in fact for this case."

Dr. Kinsman relied on the results from testing he conducted. He admitted he did not use the Child Abuse Potential Inventory (CAPI) testing measure because he felt that it lacked reliability and validity. He also opted not to use the Minnesota Multi Phasic Personality Inventory (MMPI), and instead, used the "P-A-I" test because it did the "same kind of thing," was "a lot more user friendly," and asked less questions. The doctor's guess was that mother had some postpartum depression before minor was removed from her custody.

Dr. Kinsman opined that a parent could "potentially" benefit from counseling, permitting the safe return of a child even if the parent lied about how the child was injured. He felt that mother was not a child abuser because a child abuser has a significant personality disorder, antisocial personality, psychosis, severe substance abuse issues, or a lengthy history of violent interactions. Mother expressed grief and took responsibility for minor's injury because she "cried."

4. *TESTIMONY: STEPHANIE SIRINGORINGO*

Stephanie Siringoringo had been employed as a social services practitioner with CFS for four years. She did not recommend that parents receive FR services. Mother told a different story to Green than she told to Siringoringo. Mother told her that she saw minor crawl and fall. Minor had three fractures to her left arm and one was displaced. Mother's explanations for the injuries were inconsistent with the nature of minor's injuries, according to the medical evidence. This was concerning because minor was a small child with serious injuries. Siringoringo elaborated:

"Even more concerning is the fact that three medical professionals, I believe, stated that [parents'] account[s] of how [minor] sustained the injuries [are] not consistent with her injuries and the fact that Mother is not taking accountability . . . in actually informing us of what really happened . . . .

"I think later Dr. [Siccama] found hemorrhaging in the frontal lobe . . . . It would require a lot of acceleration or deceleration of the child. So I'm not sure if that is like some kind of shaking mechanism. . . . But . . . it was indicative of non-accidental trauma."

Father was reportedly not home when the incident occurred, and the social worker did not know if law enforcement completed their investigation, or forwarded the case to the district attorney's office.

5. *COUNSELS' ARGUMENTS*

Mother's counsel recognized it was mother's burden to demonstrate an exception to FR bypass applied. Counsel argued that mother demonstrated services were likely to prevent reabuse of minor, and minor was so closely attached to mother that FR bypass would be detrimental to minor. Mother's counsel cited statutory factors when she argued reunification services to mother would prevent minor's abuse. She stated, "the Welfare and Institutions Code talks about indication or factors the court should look to in its decision if reunification is likely to be successful or unsuccessful and whether failure or reunification is likely to be detrimental to the child." Counsel then cited to "section 361.5c" and the subsections. Mother's counsel then argued that competent professional testimony from two witnesses indicated that mother benefitted from services. Counsel

stated, "we have two professionals who came into court today who indicated that my client is likely to benefit from reunification services. The services are likely to prevent reabuse and that mother has benefitted from the services. That she's benefitted and that she could certainly do so within the 6 month time frame allowed by the court." Counsel went on to state there is no dispute that minor was injured while in mother's care. However, she argued that mother could benefit from services, even though she made no admission of abuse. Mother's counsel stated, "No one is perfect."

Father's counsel acknowledged that the court could deny FR services without knowing the perpetrator of the abuse, but argued that CFS seemed to have conceded father was not present when the injuries occurred. Father's counsel also indicated that father had no reason to know that minor was being abused.

Minor's counsel asked the court to apply FR bypass under section 361.5, subdivision (b)(5), to both parents. Minor was not really crawling, and mother's claim that minor was injured due to falling on a toy, a total of maybe six inches to the floor, was "preposterous." Mother indicated that she did nothing wrong. Mother's father and stepmother helped raise mother, but mother told Dr. Kinsman she had no childhood. Mother did not convey this to CFS. Despite stating she had no childhood, mother entrusted minor in the care of maternal grandparents. Mother was supposed to be learning and growing, but her stories were getting "more grandiose."

Counsel for CFS noted that minor fell off the couch in father's care but was not injured. Mother gave varied accounts of what occurred when minor was injured. What was not disputed was that minor had three broken bones in one arm, one of them being a

displaced fracture in the upper arm, requiring significant force for a break. Green testified that mother addressed the underlying issues at bar, however, parents did not convey how minor was injured, and child neglect is very different than physical abuse. Mother promoted the idea that minor injured herself by falling. Counsel for CFS argued that FR bypass was appropriate with mother.

6. *THE JUVENILE COURT'S FINDINGS AND ORDERS*

The juvenile court indicated it lacked evidence that father abused minor, or had any knowledge that she was being abused; the court ordered FR services for father. Concerning mother, the court noted that it was a "super close call." Mother had no criminal or CFS history, had not failed in previous services, did not abuse drugs or alcohol, and a therapist and psychologist testified in her favor. The court, however, applied FR bypass, stating:

"I have significant injuries to a 6 month old and three different broken bones in the arm as well as hemorrhaging in the brain. . . . Mother's story is just so extremely unbelievable. It really is disturbing to me. [I]t is the Mother's burden though it's preponderance of the evidence, it's too close in this case that I can't find that has been met when there is really no acknowledgment on the stand of anything other than Oh, I turned away.

". . . I need some more acknowledgment than I've heard this in this case so I am gonna deny services to the Mother under 361.5.B5."

The juvenile court invited mother to continue services on her own and to file a section 388 petition after her acceptance of some responsibility for minor's injuries.

The court found father to be the presumed father, removed minor from paternal custody, ordered minor placed with the maternal grandparents, and ordered FR services for father. The court denied FR services for mother because minor was a victim of severe physical abuse described under section 300, subdivision (e). The court also ordered supervised visits, and set the six-month review hearing for January 17, 2017.

D. NOTICES OF APPEAL

On July 17, 2017, mother filed her notice of appeal stating her objection to the court's denial of FR services for her and requested a review of the section 300 findings. On August 14, 2017, mother filed a second notice of appeal simply indicating mother's objection to the court applying FR bypass."

On April 24, 2018, we issued our opinion affirming the juvenile court's jurisdiction findings and dispositional order.

II. PROCEEDINGS AFTER JULY 17, 2017, IN CASE NO. E070389:

A. SECTION 366.21(e) HEARING

On January 4, 2018, CFS filed a six-month review hearing report, recommending that the court maintain then one-year-old minor, in her placement with her maternal grandparents and continue father's services. CFS reported that both mother and father "showed their determination" to reunify with minor by "initiating their own services." The social worker noted:

"[Parents] have been going to couples counseling . . . through Stepping Stones. . . . [Parents] have also been participating in supervised visits through Making a Different Association (MADA)."

Nevertheless, CFS was concerned about parents' ability to care for and protect minor:

"It is very clear that [parents] are still a couple and are wishing to parent their child together. [Father] has indicated that he understands the ramification of being in a relationship with [mother] who was not offered services. At this time, CFS does not have the confidence that [father] can parent [minor] on his own and protect her from [mother]."

Previously, on December 9, 16, and 23, 2017, both mother and father had positive visits with minor. Mother initiated affectionate physical contact with minor and engaged her with verbal cues. Minor remained in "close proximity" to and maintained eye contact with parents during the visits. Mother played with minor, called her "my sunshine" and interacted well with minor during "kitchen play." Parents were attentive to minor throughout their visits.

On January 17, 2018, the juvenile court continued the six-month review hearing and allowed father unsupervised visits with minor.

On February 13, 2018, the social worker recommended the return of minor to father's custody for an extended visit based on father's compliance with his case plan. CFS was concerned that parents were still in a relationship, but father denied it. Father's extended visit was conditioned on not allowing mother unauthorized access to minor. The juvenile court ordered a 29-day extended visit for minor with father. The court continued mother's supervised visitation.

On March 5, 2018, mother filed a section 388 petition asking the court to order reunification services; to liberalize mother's visits to unsupervised; or in the alternative, to return or to transition minor to mother's care. In support of her petition, mother asserted that she completed a parenting program, a domestic violence program, coparenting, counseling, and had a medication evaluation by a psychiatric nurse practitioner. She also relied on the opinions of Dr. Kinsman and Ms. Johnson-Green that mother would benefit from services. Additionally, mother maintained consistent visitation with minor.

In mother's statement supporting the new evidence or changed circumstances, mother explained that she continued her individual therapy at Stepping Stones where she learned about her family history and how it "molded [her] into the person [she is] now." Of importance was also the fact that mother and the therapist had "also spoken about how [she] could have *prevented any injuries* to [minor]." One of the measures, in mother's understanding, was to carry minor in a baby carrier while she was making her a bottle.

In her January 9, 2018, letter mother's therapist confirmed that mother completed eight sessions of individual therapy to address "family dynamics, insight concerning her symptoms of depression, anxiety, as well as coping strategies." Mother also worked towards the goal of "[making] sure to always keep her child safe." In a letter dated a month later, the therapist added that she had read "all of the court reports" for mother concluding that mother had met her therapeutic goals and could safely parent minor.

To demonstrate her bond with minor, mother attached a series of visitation logs from MADA. According to the visitation coach, the visits went well. Parents seemed

happy to see minor, and minor was responsive in her interactions with parents as well. Both parents played games with minor and worked on her language skills. In a few incidents where minor hit herself or fell during the visit, mother comforted minor.

On March 7, 2018, the juvenile court placed mother's petition on the court calendar to determine whether it would grant an evidentiary hearing on the matter. On March 12, 2018, the court returned minor to father on family maintenance; the court granted CFS authority to dismiss the case with custody orders by approval packet. As to mother's section 388 petition, the court noted: "Mother's counsel filed a 388. I set it today to see whether or not I should grant an evidentiary hearing." In response, CFS asked for time to evaluate mother's petition and to assess mother's request for increased visits to twice a week. The court set the section 388 for a further hearing on April 11, 2018.

The social worker's initial response acknowledged that "mother has taken responsibility for the injury that occurred to [minor]." Moreover, mother felt that she had done everything in order to reunify with minor and was hopeful for a chance to practice the skills she learned with minor. Additionally, the report indicated that CFS increased mother's visits to twice a week and the visits were going well; mother "has never missed a visit." CFS commended mother on her progress in services but also acknowledged that the goal of reunification had been met since minor was placed with father.

Although CFS's initial response was in favor of the court granting mother's section 388 petition, CFS requested another continuance to confer with CFS management. In its additional information to the court prepared for the continued section

388 hearing, CFS changed its recommendation. The supervising social worker reminded the juvenile court of the severity of minor's injures: a displaced radial fracture, a fracture to the humorous bone, a transverse buckle fracture of the ulna and cerebral hemorrhages. Mother failed to explain the injuries or to account for them even at the time of her section 388 petition. The combination of minor's tender age, her vulnerability, and the severity of the injuries presented "too great of a risk" in the supervisor's opinion. Therefore, the recommendation of CFS was to deny mother's petition.

On April 11, 2018, the juvenile court continued mother's section 388 petition to April 19, 2018.

At the hearing on April 19, 2018, CFS underscored the severity of the multiple injuries minor sustained under mother's care. In fact, counsel for CFS pointed out that the fracture of the humerus bone required surgery to repair the displaced bone. CFS's counsel argued that mother's position at the time of the contested dispositional hearing and now remained the same: "Mother's position then and now is that this was some type of accident and that she acted negligently, which is totally controverted by the medical evidence." A year after the injuries, "we have no explanation by Mother of how these injuries occurred, no acceptance of responsibility, and when there's a denial of reunification under (b)5, the mother must show—not by preponderance of the evidence, but by clear and convincing evidence of change of circumstances and best interest."

Minor's counsel echoed CFS's concerns: "[T]he therapist that Mother is working seems to be working off the assumption that Mother's version of events, in terms of being

accidental, is accurate." To that end, mother took responsibility for "not sufficiently watching the kid or monitoring the kid" and "for a lack of proper supervision."

Mother's counsel expressed dismay at the change in CFS's recommendation and asked the court to grant a full evidentiary hearing on the petition.

The juvenile court, in denying mother's request for a full evidentiary hearing, explained as follows:

"There was never any real question in this case that Mom would engage in services. . . . [¶] The real issue in the case was her being able to take responsibility for these injuries, and that was always the case. The problem is that it remains the same case.

"Saying that this was an accident on a child this young, that she just fell, or whatever, is entirely inconsistent with the number of injuries and the type of different injuries that we see in this case.

"Saying, 'I was negligent and didn't watch the child' is not taking responsibility because it doesn't explain what happened to this very young child. [¶] . . . [¶]

"So I really don't see a change in circumstance. Despite the good work that Mom has done, and her attempts to improve herself, I really don't think we are in much of a different position"

Thereafter, the court denied mother's section 388 petition, stating that mother failed to establish a change of circumstances and the relief mother sought was not in the child's best interest.

Mother filed a timely notice of appeal.

DISCUSSION

Mother argues that the juvenile court abused its discretion in summarily denying her section 388 petition without a hearing because there was prima facie evidence that circumstances were changed and granting the petition was in minor's best interest. CFS argues that court's denial of the section 388 petition must be affirmed because "the court held three different hearings on the issue . . ., allowing Mother's counsel to demonstrate to the court how the petition met the prima facie standard."

Under section 388, a juvenile court order may be changed or set aside "if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*Ibid.*; § 388, subd. (d) ["If it appears that the best interests of the child . . . may be promoted by the proposed change of order, . . . the court shall order that a hearing be held"].) The prima facie requirement is not met "unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Zachary G.*, at p. 806.) We review the court's order denying a hearing for abuse of discretion. (*Id.* at p. 808.) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

Mother argues that her circumstances had changed because "she addressed her parenting deficiencies and was able to safely care for [minor]. Thus, mother ameliorated the problem which led to the dependency proceeding and established a change of circumstances which *may* require modification of the court's July 17, 2017, order." We need not decide whether the juvenile court erred in finding there was no prima facie showing of changed circumstances because even if mother provided sufficient evidence of changed circumstances, she did not meet her burden of showing that granting her section 388 petition was in minor's best interests.

A parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) However, when a juvenile court bypasses reunification services due to a finding that a child suffered "severe physical abuse" under section 300, subdivision (e), the focus of the dependency proceedings turns to the child's need for permanence and stability instead of family reunification. (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1074-1075.) Once severe abuse has been found, a court is "prohibited from granting reunification services 'unless it finds that, based on competent testimony, those services are likely to prevent reabuse . . . or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent.' " (*Ibid.*, quoting § 361.5, subd. (c).) The focus on the child's best interest

remains in place regardless of whether or not a parent seeks additional services under section 388. (*Edward H.*, at p. 594.)

In *Angel B.* (2002) 97 Cal.App.4th 454, the court affirmed a juvenile court's ruling that denied a mother a hearing on her section 388 petition based on findings that the mother failed to make the requisite prima facie showing of changed circumstances and that the proposed change in custody was in the child's best interest. The *Angel B.* court reasoned that, "there was no evidence that Mother was ready to assume custody of Angel or provide suitable care for her; while she had completed the drug program, the time she had been sober was very brief compared to her many years of drug addiction (a concern expressed by the social worker), and in the past she had been unable to remain sober even when the stakes involved were the loss of her other child. Nor was there evidence that she had a housing situation suitable for Angel, or any arrangements for child care while she worked. And . . . there was no evidence that Angel preferred to live with Mother rather than with the foster family." (*Angel B.*, at p. 463.) In addition, "a primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. [Citation]. That need often will dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child." (*Id.* at p. 464.) The court in *Angel B.* noted that the burden of proof "is a difficult burden to meet in many cases, and particularly so when, as here, reunification services have been terminated or never ordered. After the termination of reunification services, a parent's interest in the care, custody and companionship of the

child is no longer paramount. [Citation.] Rather, at this point, the focus shifts to the needs of the child for permanency and stability." (*Ibid.*)

Here, as in *Angel B.*, mother failed to make a showing that granting mother's section 388 petition was in minor's best interest. As provided above, when "reunification services are terminated (or, as in this case, never ordered in the first place), the focus of the proceedings changes from family reunification to the child's interest in permanence and stability." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.) In this case, the juvenile court did exactly what is mandated by law—it focused on minor's permanence and stability. On February 13, 2018, minor was placed on an extended visit with father. Based on the positive extended visit, the court ordered family maintenance for minor in father's care on March 12, 2018, By the time mother filed her section 388 petition, minor had been safely placed and reunified with father. Minor's best interest at that point was stability in father's home. CFS does not contest that mother had a bond with minor. However, if "maintaining her close and bonded relationship" with minor is mother's goal—the court granted her request. On February 13, 2018, when counsel for CFS advised the court that mother was "to continue to receive her weekly visit," the court confirmed. The court stated, "As long as the social worker knows that she can work with you guys to make sure Mom gets visits." Moreover, on March 12, 2018, mother's counsel asked for an increase in visits. The court asked the social worker "to attempt to increase Mother's visits to two times a week." At the April 11, 2018, hearing, "[t]he Department . . . already liberalized Mother's visitation, [which] was requested at the last

hearing [and] that will all continue pending our return to court [for the 388 hearing]." Mother's visits were not reduced after the section 388 hearing.

Nevertheless, in her reply brief, mother contends that "providing mother with reunification services and increased visitation would not delay or impair [minor's] prospects for permanency. On the contrary, by further elevating her parenting capacity and strengthening her already positive relationship with father—the relief mother sought would enhance the child's chances to achieve permanency, with both of her parents." We disagree with mother's assessment. Mother has never admitted that she caused the initial horrific injuries to minor. Mother contends that minor "was no longer at risk in mother's care" because mother "did accept responsibility for causing [minor's] injuries." Although the social worker noted that "mother has taken responsibility for the injury that occurred to [minor]," that admission related to the fact that mother could have taken steps to prevent the injuries from happening, "such as carrying [minor] around with her and not leaving her unattended." Although the social worker did note that mother accepted responsibility for her actions—after reviewing the evidence in this case—there is nothing to indicate that mother admitted to causing the serious and non-accidental injuries to minor. As discussed in our prior opinion in this matter—minor had broken bones and blood in her brain. The treating doctors confirmed that non-accidental trauma was inflicted upon minor. Therefore, we find mother's argument to be unpersuasive.

In sum, because the record showed that father had already reunified with the child and CFS was given authority to dismiss the case by approval packet, minor's best interest of stability and permanence was promoted by denying mother's section 388 petition—

which would have prolonged minor's case. Accordingly, the juvenile court did not abuse its discretion in denying mother's section 388 hearing.

DISPOSITION

The juvenile court's order denying mother's section 388 petition is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

FIELDS
J.